MISDEMEANANTS, FIREARMS, AND DISCRETION: THE PRACTICAL IMPACT OF THE DEBATE OVER "PHYSICAL FORCE" AND 18 U.S.C. § 922(g)(9)

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INTRODUCTION

Many people would consider simple assault to be a relatively minor state misdemeanor offense that carries minimal punishment. Simple assault cases are often tried before a judge without a jury[1] and are many times the subject of a plea agreement. If the assailant commits a simple assault on a person in a federally recognized domestic relationship,[2] that assault becomes a "misdemeanor crime of domestic violence," a crime which prohibits the assailant from future possession of a firearm[3] and creates the possibility of extremely harsh federal criminal sanctions. Simple assault—or any other misdemeanor with an element of physical force—committed against a domestic relation can be a predicate offense to federal criminal firearm possession laws carrying fines of $250,000 and sentences of ten years in federal prison.[4]

The federal government has codified the potential firearm restriction for qualified domestic offenders in 18 U.S.C. § 922(g)(9), the Lautenberg Amendment, which subjects a criminal convicted of a misdemeanor crime of domestic violence to a federal firearm restriction. The Lautenberg Amendment is one of the recently enacted federal criminal statutes dependent on the prosecution of criminals under a state's substantive law.[5] The use of state convictions and outcomes allows the state to "play a significant ... substantive part in facilitating federal criminal justice policy and goals."[6] Some commentators have posited that using state criminal proceedings as predicate offenses to federal firearms convictions

1. *See* Baldwin v. New York, 399 U.S. 66, 72-73 (1970) (allowing trial by judge alone when potential penalty is less than six months but stating that "administrative conveniences ... can[not] ... justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment.").

2. Federally recognized domestic relationships include "the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person." 18 U.S.C. § 921(a)(32) (2000).

3. *Id.* § 922(g)(9) (prohibiting anyone who has been convicted of a misdemeanor crime of domestic violence from possessing a firearm).

4. *Id.* §§ 924(a)(2), 3571(d)(3)-(4).

5. For an in-depth discussion of the "infus[ion of] federal law with the normative judgments of the respective states," see Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 67 (2006).

6. *Id.* at 70.

leads to (1) arbitrary application,[7] and (2) "abdicat[ion] ... [of] criminal lawmaking authority in deference to individual states."[8] Federal courts interpreting federal statutes based on state substantive law must directly face these two concerns.

Congress has made it easier to import state substantive law into the federal system in limited instances, such as determining what constitutes a "conviction."[9] In other circumstances, however, Congress has not given the federal courts clear guidance.

Section 922(g)(9) criminalizes the possession of firearms by anyone convicted of a misdemeanor crime of domestic violence containing an element of the "use or attempted use of physical force."[10] Yet the circuit courts cannot agree on what amount of "physical force" qualifies as a predicate state court offense. The answer to the qualifying amount of "physical force" lies within the state courts' own judicial determinations and can be found by looking to the state courts to determine if the misdemeanor offense contains an element of physical force. By allowing the use of the state courts' determination, the federal courts infuse a bit of arbitrariness into the federal system. After all, substantive elements and definitions of "assault" vary from state to state.

This Note discusses the effect of the disagreements among the courts of appeals interpreting "physical force" in order to apply 18 U.S.C. § 922(g)(9) to misdemeanant domestic offenders. Part I examines the decisions by the federal courts and finds that three different approaches to the issue exist: two based on strict statutory construction and one openly accepting the infusion of state substantive law. Part II discusses the practical impact of the debate over "physical force" in § 922(g)(9) and its effect on federal prosecutions and military service. Part II suggests that limited infusion of state substantive law into the federal system—the interpretation of state case law—allows the state prosecutor the broadest possible discretion to confront the issue of domestic violence. Analyzing the requisite amount of force in light of a state's substantive determina-

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7. *See id.* at 90-96.

8. *Id.* at 85, 86-90.

9. *See* § 921(a)(20)(B) ("What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.").

10. *Id.* § 921(a)(33)(A)(ii).

tions allows state prosecutors to ensure that the charged misdemeanor is the most appropriate charge for the offense. In many domestic violence situations, the answer is clear: society wants the violent misdemeanant to lose his access to firearms. However, the question of the requisite level of physical force is more difficult when the offense is not "violent" but merely "offensive" or de minimis. Using the state's substantive findings to guide the federal statute's applicability helps to ensure that the prosecutor has the ability to charge the offender appropriately, as the prosecutor understands the amount of force needed for a state level conviction. This gives the prosecution the ability to charge an offender under an alternate statute if conviction would impose a federal firearm restriction, which under the circumstances might be too great a criminal sanction.

The Note concludes with a brief look at the practical impact that the limited infusion of state substantive law, along with broad prosecutorial discretion, has on law enforcement and the military, two segments of society in which a misdemeanor crime of domestic violence is not only a threat to a domestic relationship, but also to the law officer's or uniformed service member's career. Furthermore, this infusion minimizes the possible "chilling effect" of 18 U.S.C. § 922(g)(9) in situations where a law enforcement officer or military service member may have engaged in criminal conduct for which an indefinite firearm restriction may be inappropriate.

I. "PHYSICAL FORCE" AND THE COURTS OF APPEALS

On July 17, 2006, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction of Jerry Lee Griffith for possession of a firearm after his conviction under Georgia's simple battery statute.[11] Griffith had beaten his wife and subsequently pleaded guilty to two counts of violating Georgia's simple battery statute, a misdemeanor.[12] Count one alleged that Griffith had made "contact of an insulting and provoking nature to Delores Griffith, his wife, by hitting her."[13] The second count, also for intentional

11. United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006).
12. *Id.*
13. *Id.*

"contact of an insulting and provoking nature," was for "dragging her across the floor."[14] Two years later, Griffith was arrested for possessing a firearm, violating 18 U.S.C. § 922(g)(9), the section of the Armed Career Criminal Act (ACCA) making it a felony for any person who has been convicted of a "misdemeanor crime of domestic violence" to possess either a firearm or ammunition that has traveled in interstate commerce.[15]

A "misdemeanor crime of domestic violence" has three elements as defined by the United States Code. First, the crime must be "a misdemeanor under Federal or State law."[16] Second, the crime must "ha[ve], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon."[17] Third, the crime must be committed against a person in a recognized domestic relationship to the assailant.[18] Griffith challenged his § 922(g)(9) conviction under the theory that the Georgia statute failed to satisfy the second element because it did not have an element of "physical force."[19] The Eleventh Circuit held that the Georgia statute, requiring the intentional "physical contact of an insulting or provoking nature with the person of another,"[20] adequately satisfied the "physical force" requirement explicit in 18 U.S.C. § 921(a)(33)(A)(ii) and implicit in § 922(g)(9).[21]

Griffith was the most recent salvo fired between the courts of appeals grappling with the interpretation and application of § 922(g)(9). With *Griffith*, the Eleventh Circuit joined the First, Eighth, and Ninth Circuits in the debate over what, as the Eleventh

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14. *Id.*

15. *Id.* at 1340-41 (quoting § 922(g)(9)).

16. 18 U.S.C. § 921(a)(33)(A)(i) (2000).

17. *Id.* § 921(a)(33)(A)(ii). In its entirety, the section reads,

> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id.

18. *Id.* Importantly, the domestic relationship is codified in § 921(a)(33)(A)(ii) and, thus, may or may not be codified in the state statute.

19. *Griffith*, 455 F.3d at 1341.

20. *Id.* (quoting GA. CODE ANN. § 16-5-23(a)(1) (2006)).

21. *Id.* at 1342.

Circuit stated, qualifies as "physical force" for § 922(g)(9) purposes.[22] At first glance, the majority of circuit courts to address the issue agree with the Eleventh Circuit's decision in *Griffith*: *any* misdemeanor with an element of use or attempted use of force can qualify if committed against a domestic relation.[23] The Ninth Circuit stands alone by holding that only "violent" physical force can bring a misdemeanor under the purview of § 922(g)(9).[24]

Close examination of the First, Eighth, Ninth, and Eleventh Circuits' reasonings leads to a conclusion that there are actually *three* separate interpretations of "physical force" as it applies to § 922(g)(9): (1) that de minimis offensive contact qualifies the misdemeanor,[25] (2) that, subject to state law interpretation, offensive contact must be more than de minimis but need not rise to the level of "violent" physical force,[26] and (3) that the statutes require "violent" physical force.[27] Following an assessment of the reasoning behind each interpretation, it is apparent that the second approach, a state law supported finding that physical force must be more than just de minimis but need not rise to the level of "violent," most clearly aligns with the judicial history of the statutes and is the most logical interpretation.

A. Majority Interpretation: "Any" Physical Force

Of the four circuit courts that have directly addressed the interpretation of "physical force" under § 922(g)(9), three have held that any physical force could be enough to trigger the federal statute, provided the state statute has a requirement of such force.[28]

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22. *Id.* at 1341; *see* United States v. Belless, 338 F.3d 1063, 1066-68 (9th Cir. 2003); United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 619-21 (8th Cir. 1999). Additionally, the Seventh Circuit has addressed similar statutory interpretations under 18 U.S.C. § 16 (2000). *See* Flores v. Ashcroft, 350 F.3d 666, 668 (7th Cir. 2003).

23. *See Nason*, 269 F.3d at 12; *Smith*, 171 F.3d at 619-21. As will be explained, although *Nason* and *Smith* arrive at the same conclusion, their reasonings are quite different. Thus, *Nason* will ultimately be viewed as creating a third analysis of the "physical force" debate.

24. *See Belless*, 338 F.3d at 1068.

25. *See Griffith*, 455 F.3d at 1342; *Smith*, 171 F.3d at 621.

26. *See Nason*, 269 F.3d at 19.

27. *See Belless*, 338 F.3d at 1068.

28. *See Griffith*, 455 F.3d at 1342-43; *Nason*, 269 F.3d at 15-21; *Smith*, 171 F.3d at 619-21.

Although the three courts are in agreement as to the ultimate result, they are not in agreement as to the reason. The Eleventh Circuit in *Griffith* and the Eighth Circuit in *Smith* proceeded along similar lines to reach their results.[29] The reasoning is in marked contrast to the reasoning of the First Circuit in *Nason*.[30] *Nason* merits its own discussion apart from *Griffith* and *Smith*.

Beginning its interpretation of § 922(g)(9), the *Griffith* court made it clear that it was engaging in an exercise of statutory interpretation and not a factual review of Jerry Griffith's conviction. The court proceeded:

> The question is not whether the actual conduct that led to Griffith's prior conviction involved physical force or worse.... Wife beating and dragging is conduct that involves physical force under any definition of that term. The ... definition ... does not turn on the actual conduct underlying the conviction but on the elements of the state crime.[31]

Statutorily, in order to determine whether Griffith's crime was a qualifying misdemeanor under § 922(g)(9), the court must consider whether the statute under which he pleaded guilty contained an element of "the use or attempted use of physical force" under 18 U.S.C. § 921(a)(33)(A)(ii). The *Griffith* court reviewed the Georgia simple battery statute under which Griffith pleaded guilty. The statute stated that "[a] person commits the offense of simple battery when he or she ...: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another."[32]

In its interpretation of the Georgia statute, the *Griffith* court looked at "the plain meaning of its words," namely the plain meaning of "physical force" under § 921(a)(33)(A)(ii).[33] By comparing

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29. *See Griffith*, 455 F.3d at 1342-43; *Smith*, 171 F.3d at 619-21.

30. *Nason*, 269 F.3d at 15-21.

31. *Griffith*, 455 F.3d at 1341; *see also Smith*, 171 F.3d at 620.

32. *Griffith*, 455 F.3d at 1341 (quoting GA. CODE ANN. § 16-5-23(a)(1) (2006)).

33. *Id.* at 1342 (quoting United States v. Maung, 267 F.3d 1113, 1121 (11th Cir. 2001)); *see also Smith*, 171 F.3d at 620. The Supreme Court explained "plain meaning" in these terms: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). Accordingly, "[t]his generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it

the Georgia statute's definition of battery to the plain meaning of "physical force," the court determined that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force."[34] Under this point-by-point, element-by-element approach, the Eleventh Circuit affirmed Griffith's conviction.[35]

The Eleventh Circuit's analysis in *Griffith* is very similar to the Eighth Circuit's analysis in *Smith*. However, in *Smith*, the Eighth Circuit confronted a domestic assault that, under Iowa's bifurcated assault law, could have been either (1) an "act ... intended to cause pain or injury," or (2) an "act ... intended to place another in fear of immediate physical contact."[36] The Eighth Circuit recognized that an Iowa assault conviction of an act "placing another in fear of imminent physical contact" would not qualify under § 921(a)(33)(A)(ii) because there would be no element of either "use or attempted use of force."[37]

Focusing on the conviction as an "act ... intended to cause pain or injury," the Eleventh Circuit found in *Griffith* that any amount of "physical force" qualified.[38] In order to bolster its finding, the Eleventh Circuit examined the "close neighbor of the statutory provision" it was interpreting.[39] The Eleventh Circuit considered 18 U.S.C. § 922(g)(8)(C)(ii), which comes immediately before § 922(g)(9) in the United States Code.[40]

Section 922(g)(8)(C)(ii) concerns the use of firearms by any person subject to a protective order.[41] In this neighboring section, the United States Code contains limiting and clarifying language absent from § 922(g)(9). This language states that it is unlawful for any person subject to a court order that "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force

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a different meaning." 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:01 (6th ed. 2000).

34. *Griffith*, 455 F.3d at 1342.

35. *Id.* at 1340-45.

36. *Smith*, 171 F.3d at 620; *see* IOWA CODE § 708.1 (2005).

37. *Smith*, 171 F.3d at 620.

38. *Griffith*, 455 F.3d at 1342-43.

39. *Id.* at 1342.

40. *Id.*; *see* 18 U.S.C. § 922(g)(8)(C)(ii) (2000).

41. § 922(g)(8)(C)(ii).

... that would reasonably be expected to cause bodily injury"[42] to possess a firearm. The omission of the words "reasonably be expected to cause bodily injury" in 18 U.S.C. § 922(g)(9) suggested to the Eleventh Circuit that any amount of physical force involved in a misdemeanor conviction would qualify under § 922(g)(9), even offensive touching.[43] The court quoted the Supreme Court to emphasize the significance of the omission: "It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[44]

Quite contrary to the Eleventh Circuit's finding, it is not entirely clear that the omission of that language should be subject to a presumption of "disparate exclusion" by Congress. First, 18 U.S.C. § 922(g)(8)(C)(ii) and § 922(g)(9), although part of the same section of the United States Code, are very different in origin. They are not part of a comprehensive alteration to Title 18 but were enacted several years apart by separate acts[45] and address separate factual considerations.[46] Second, 18 U.S.C. § 922(g)(9) was the product of several years of work and revisions.[47] The quality of the final version of 18 U.S.C. § 922(g)(9) has been debated. Some have suggested that "[t]he final version of the law was poorly drafted and internally inconsistent."[48] Although the circuits have seized upon

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42. *Id.* (emphasis added).

43. *See Griffith*, 455 F.3d at 1342-43.

44. *Id.* at 1342 (quoting Duncan v. Walker, 533 U.S. 167, 173 (2001)) (internal citation, quotation marks, and alteration omitted).

45. Section 922(g)(8)(C)(ii) was enacted as part of the Violent Gun Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 1796, 2015 (1994). Section 922(g)(9) was enacted as part of the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 658x7, 110 Stat. 3009, 3009x372 (1996). The quoted language in *Griffith* from *Duncan v. Walker*, 533 U.S. at 173, refers to the interpretation of three sections of 28 U.S.C.: §§ 2244, 2254, and 2261. *See Griffith*, 455 F.3d at 1342. Congress adopted each of these sections as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

46. Section 922(g)(8)(C)(ii) addresses firearm possession following the issuance of a protective order or restraining order. Section 922(g)(9), as has been stated, addresses possession of a firearm following conviction for a misdemeanor crime of domestic violence.

47. *See* Tom Lininger, *A Better Way To Disarm Batterers*, 54 HASTINGS L.J. 525, 551-58 (2003) (outlining the history of 18 U.S.C. § 922(g)(9)).

48. *Id.* at 556. The D.C. Circuit has even commented on its difficulty interpreting 18 U.S.C. § 921(a)(33)(A) in *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002). In *Barnes*,

the absence of the words "reasonably be expected to cause bodily injury" from § 922(g)(9), the intentional omission of that language remains open to debate.

The practical effect of the interpretation of "physical force" under *Griffith* is to qualify misdemeanants under § 922(g)(9) who have been convicted of crimes involving "offensive contact" that can be as slight as insolent contact with another person's glasses or hitting someone with a paper airplane.[49] This interpretation makes no allowance for domestic offenders guilty of "offensive physical contact," but subjects them to the same punishments as domestic offenders guilty of "violent physical contact." In a pragmatic sense this does not matter in a factual situation that mirrors *Griffith* or *Smith*; the offenders in each of those cases had committed violent physical assaults on their domestic partners.

B. United States v. Belless*: "Violent" Physical Force*

In opposition to the holdings in *Griffith* and *Smith*, the Ninth Circuit Court of Appeals addressed the statutory interpretation of "physical force" under 18 U.S.C. §§ 921(a)(33)(A)(ii) and 922(g)(9) in *United States v. Belless*.[50] Robert Belless was convicted of violating a Wyoming assault and battery statute after he "assault[ed] Kristen Belless—grabbing her chest/neck area and pushing her against her car in an angry manner."[51] Belless was indicted six years later for possession of a firearm after having been convicted of the misdemeanor crime of domestic violence.[52] Belless appealed on two grounds: (1) that the Wyoming statute did not have an element requiring a domestic relationship, and (2) that the Wyoming statute "embrace[d] conduct that does not include 'use or attempted use of physical force.'"[53]

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the court stated, "[n]eedless to say, if the Congress had more precisely articulated its intention, our task would have been easier." *Id.* at 1361.

49. These examples are drawn from Judge Easterbrook's opinion in *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003). Easterbrook has difficulty with the force requirements in some statutes, raising the pertinent question, "How is it possible to commit *any* offense without applying a dyne of force?" *Id.* at 672.

50. 338 F.3d 1063 (9th Cir. 2003).

51. *Id.* at 1065.

52. *Id.*

53. *Id.* at 1065, 1067.

Noting that "[a]ny touching constitutes 'physical force' in the sense of Newtonian mechanics,"[54] the Ninth Circuit went on to hold that the "physical force to which the federal statute refers is not *de minimis*."[55] The Ninth Circuit interpreted the Wyoming statute under which Belless was convicted as "criminalizing conduct that is minimally forcible, though ungentlemanly."[56]

The Wyoming statute's intent, as understood by the Ninth Circuit, was to "enable police to arrest people in such confrontations in order to avoid the risk that rude touchings will escalate into violence."[57] Predicate offenses for the federal statute that require the "use or attempted use of physical force" did not "include mere impolite behavior."[58] The Wyoming statute certainly could include violent physical force but was not limited to such force; therefore, the court held that "physical force" under § 921(a)(33)(A)(ii) had to be "violent use of physical force against the body of another individual."[59]

Although the Ninth Circuit's holding is currently the minority position and stands against the holdings of three other circuits, the implications derived from *Belless* are telling. *Belless* is concerned with the possibility that finding *any* convicted misdemeanant liable under § 922(g)(9) may overemphasize the predicate act. The court recognized that Belless was violent in his actions toward his wife but still overturned his conviction under § 922(g)(9).[60] The Ninth Circuit, however, made its determination not based on the predicate act itself, but on the Wyoming statute, which can be interpreted as

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54. *Id.* at 1067.

55. *Id.* at 1068.

56. *Id.* The Wyoming statute defined Belless's crime as "unlawfully touch[ing] another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causing bodily injury to another." *Id.* at 1065 (quoting WYO. STAT. ANN. § 6-2-501(b) (2003)).

57. *Id.* at 1068. This statute intends arrest *before* "rude touchings" escalate into "violence." § 6-2-501(b). This embodies a preemptive purpose of the qualifying misdemeanor. As discussed below, the legislative history of § 922(g)(9) indicates that the federal statute has a reactive purpose, namely to prevent possession of firearms by those who have pleaded down a felony to a misdemeanor. Identifying this distinction is important because the emphasis on the quantum of physical force under the state statute here is minor force with a potentially violent outcome. That is the opposite of the would-be felon who has pleaded down his violent crime to a lesser misdemeanor and who is therefore targeted by § 922(g)(9).

58. *Belless*, 338 F.3d at 1068.

59. *Id.*

60. "The record indicates that Belless was charged with conduct that was a violent act and not merely a rude or insolent touching." *Id.* at 1068-69.

applying to either violent *or* offensive contact.[61] The court would not engage in speculation as to which type of conduct Robert Belless pleaded guilty.[62] Furthermore, the court showed concern that insolent and rude touchings may well "escalate into violence" but there is no clear indication that such escalation occurs with each insolent touch.[63]

C. United States v. Nason*: State Court Interpretations*

The First Circuit considered the definition of "physical force" under 18 U.S.C. §§ 921(a)(33) and 922(g)(9) after the United States District Court for the District of Maine handed down two conflicting rulings on motions defining those statutes.[64] The First Circuit's decision in *United States v. Nason* ultimately reached the same results as the Eighth and Eleventh Circuits in *Smith* and *Griffith*, respectively. The First Circuit held that "assault regulated under Maine's general-purpose assault statute necessarily involve[s] the use of physical force. As a result, all convictions under that statute for assaults upon persons in the requisite relationship status qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)."[65] In reaching its conclusion, the First Circuit, as the Eighth and Eleventh Circuits had done, looked to the statute's plain meaning,[66] the omission of pertinent language from § 922(g)(9)'s preceding subsection,[67] and the section's legislative history.[68]

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61. *See supra* note 56 and accompanying text.

62. *Belless*, 338 F.3d at 1069.

63. *Id.* at 1068. The Ninth Circuit drew a parallel to a confrontation between Vice President Richard Nixon and Soviet Premier Nikita Khruschev in which Nixon "jabb[ed] the Soviet Premier's chest with his pointed finger." *Id.* The anecdote continued that "both men, though perhaps exaggerating their [e]ffect for the crowd, looked 'angry.'" *Id.* This action could have constituted an offensive-conduct assault by Nixon against Khrushchev. There was, however, little chance the two world leaders' confrontation would escalate to the point of violent physical contact.

64. *See* United States v. Nason, No. 00-CR-37-B-S, 2001 WL 123722 (D. Me. Feb. 13, 2001); United States v. Southers, No. 00-83-P-H, 2001 WL 9863 (D. Me. Jan. 3, 2001).

65. United States v. Nason, 269 F.3d 10, 21 (1st Cir. 2001).

66. *Id.* at 16.

67. *Id.*

68. *Id.* at 17.

To be clear, the First Circuit found that *any* physical force, however slight, can qualify as an offense under § 922(g)(9).[69] What separates *Nason* from both *Smith* and *Griffith* is how the First Circuit attempted to interpret the underlying state statute on which Nason pleaded guilty. Giving deference to Maine's Supreme Court, the First Circuit engaged in a detailed analysis of Maine's assault statute and what qualified as "a sufficient actus reus."[70]

The facts of *Nason* are common. Nason pleaded guilty to violating Maine's general-purpose assault statute and received a three-day jail sentence.[71] Maine's assault statute, like many state assault statutes, is divided into two sections that provide that a person may be guilty of a misdemeanor assault if "the person intentionally, knowingly or recklessly causes [either] bodily injury ... to another" or "offensive physical contact" with another.[72] The assault to which Nason pleaded did not specify whether the contact was assault leading to "bodily injury" *or* to "offensive physical contact."[73] The First Circuit, considering that the state courts could have found Nason guilty under one of two theories (bodily injury or offensive physical contact), readily determined that a conviction under a theory of "bodily injury" would satisfy the physical force requirement required in § 922(g)(9).[74] The First Circuit's interpretation of "offensive physical contact" required deeper analysis.

The review of Maine's criminal cases indicated to the First Circuit that Maine had adopted an interpretation of "offensive physical contact" that entailed "something less than bodily injury ... but require[d] more than a mere touching of another."[75] The Maine

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69. "The substitution of 'physical force' as the operative mode of aggression element effectively expanded the coverage of § 922(g)(9) to include predicate offenses whose formal statutory definitions contemplated the use of any physical force, regardless of whether that force resulted in bodily injury or risk of harm." *Id.* at 17-18.

70. *Id.* at 18.

71. *Id.* at 12.

72. ME. REV. STAT. ANN. tit. 17-A, § 207(1) (2005).

73. *Nason*, 269 F.3d at 18. The state courts in Georgia and Wyoming had also failed to specify whether the guilty pleas of Griffith and Belless were for assaults that caused bodily injury or offensive contact (or if the determination was made, it was not acknowledged by the federal courts in the prosecution under § 922(g)(9)). *See* United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1065 (9th Cir. 2003).

74. "Common sense supplies the missing piece of the puzzle: to cause *physical injury*, force necessarily must be *physical* in nature." *Nason*, 269 F.3d at 20.

75. *Id.* at 19 (quoting State v. Pozzuoli, 693 A.2d 745, 747 (Me. 1997)).

Supreme Court, in *State v. Pozzuoli*, ultimately applied the "'reasonable person' standard to determine whether a contact [was] offensive."[76] The implicit suggestion from the First Circuit was that, regardless of whether Nason had actually committed assault leading to "bodily injury" or "offensive physical contact," the determination was for the state court alone. The First Circuit needed only to consider the conviction under the Maine general-purpose assault statute. "As a result," the Circuit concluded in its discussion of reconciling the federal and state statutes, "all convictions under [Maine's assault statute] for assaults upon persons in the requisite relationship qualify as misdemeanor crimes of domestic violence."[77]

The practical effect of the First Circuit's decision cannot be overstated. By addressing the judicial decisions of Maine courts interpreting Maine's assault statute, the First Circuit has allowed the state to determine the qualifying misdemeanors under 18 U.S.C. § 922(g)(9). This interpretation is in marked contrast with either the Eighth or the Eleventh Circuit, both of which failed to consider any judicial decision from Iowa or Georgia, respectively.[78] But, it was a point of state law that, in *Nason*, proved essential: even if Nason's assault conviction were for "offensive contact," the Maine courts would not have convicted him without determining that "a reasonable person would find the contact to be offensive."[79] Without the state court conviction, Nason would not have had a misdemeanor conviction to subject him to federal prosecution under § 922(g)(9).

Understood this way, a state's prior judicial decisions provide the limiting and qualifying language to § 921(a)(33)(A)(ii) and §922(g)(9). If a state's court has limited the interpretation of

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76. *Id.* (quoting *Pozzuoli*, 693 A.2d at 747-48). The *Nason* court further distinguished "touchings" and "offensive physical contact," finding "[t]wo factors distinguish mere touchings from offensive physical contacts: the mens rea requirement ... and the application of a 'reasonable person' standard to determine whether a contact is offensive." *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 19 (2004) ("A bodily contact is offensive if it offends a reasonable sense of personal dignity.").

77. *Nason*, 269 F.3d at 21.

78. The Eighth Circuit considered the interpretation of Iowa Code § 708.1 in *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999), but did not cite a single Iowa case interpreting the requisite level of "physical force" under that statute. The same is true of the Eleventh Circuit's opinion of *Griffith* interpreting Georgia's assault statute, GA. CODE ANN. § 16-5-23(a) (2006), which did not cite any Georgia cases interpreting "physical force" under that statute. *Griffith*, 455 F.3d at 1341.

79. *Pozzuoli*, 693 A.2d at 747; *see also* State v. Rembert, 658 A.2d 656, 657-58 (Me. 1997).

"offensive physical contact" (or other element of the state's assault statute) to eliminate what could be considered the "use of force or attempted use of force" element, the federal court should not read such language back into the statute.[80] Consideration of a state's case law provides the prosecuting attorney the widest latitude to prosecute the domestic offender properly. Knowing the requisite quantum of "physical force" necessary for a misdemeanor crime of domestic violence conviction allows the prosecuting attorney to select the appropriate statute under which to charge the offender. This eliminates any potential concerns of those courts that would require "violent physical force" or a higher level of force to counteract possible prosecutions for hitting someone with a paper airplane or snowball.[81] Absent those limiting state court decisions, the federal court has complete discretion to conclude that any amount of "physical force" as an element of a state court misdemeanor will qualify for possible conviction under § 922(g)(9).

Some commentators have challenged the appropriateness of using state law as a guide for predicate offense interpretation. The argument proceeds that the legislative intent shows that Senator Lautenberg, the sponsor of § 922(g)(9), "sought to ensure that his new law would be applied uniformly to reach any conviction for an act involving domestic violence, notwithstanding the vagaries of state statutory definitions."[82] The Supreme Court's decision in *Taylor v. United States* makes it clear that "absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law."[83] The *Nason* line of reason-

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80. The Ninth Circuit seemed to agree with this line of reasoning, recognizing that *Nason* was not at odds with its determination in *Belless*. "Our analysis is not in conflict with the First Circuit's decision that a Maine statute that criminalized 'offensive physical contact' furnished a predicate for conviction under § 922(g)(9).... [T]he Maine statute, though broad, had been narrowed by caselaw to 'require ... more than a mere touching of another.'" United States v. Belless, 338 F.3d 1063, 1068 (9th Cir. 2003) (internal citation omitted). The Ninth Circuit did not, however, cite a single Wyoming case to indicate or support its position that the Wyoming statute criminalizes "ungentlemanly" conduct as opposed to "violent" physical contact. *Id*. Had it done so, *Nason* and *Belless* would be quite similar in analysis.

81. *See* Flores v. Ashcroft, 350 F.3d 666, 670 (7th Cir. 2003).

82. Lininger, *supra* note 47, at 558 nn.150-51.

83. 495 U.S. 575, 591 (1990) (citing Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119-20 (1983)). Several of the circuit courts have considered the categorical approach utilized by the Court in *Taylor*, but none has found it applicable. *See, e.g.*, *Griffith*, 455 F.3d at 1341; United States v. Nason, 269 F.3d 10, 13-14 (1st Cir. 2001); *Smith*, 171 F.3d at 620-21.

ing does not attempt to make the application of the federal law "dependent on state law," though, to some extent, that is the result. Stated most simply, there cannot be a conviction under a state's misdemeanor domestic violence statutes absent that state's judicial interpretation of its own statutes. Without a state conviction, no predicate offense exists for which to convict a misdemeanant under § 922(g)(9).[84] This interpretation is consistent with *Taylor*, and does not require the federal court to "engage in an elaborate factfinding process regarding the defendant's prior offenses,"[85] because all factual determinations have already been made by the state court.

D. Clarification or Confusion?: The Legislative History of 18 U.S.C. § 922(g)(9)

Smith and *Nason* each considered the legislative history of § 922(g)(9), specifically the words of its proponent, Senator Frank Lautenberg.[86] Of the four circuit courts to address the definition of "physical force" under § 922(g)(9), neither the Ninth Circuit nor the Eleventh Circuit considered the legislative history.[87] Courts generally approach the statutory interpretation of § 922(g)(9) by utilizing the statute's "plain language" or "plain meaning" and only turn to the legislative history when the interpretation is ambiguous

84. The Ninth Circuit's decision in *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005) might be a good example of federal laws not "be[ing] construed so that their application is dependent on state law," as was the Supreme Court's concern in *Taylor*, 495 U.S. at 591. In *Brailey*, the Ninth Circuit found that even though the Utah misdemeanor conviction did not result in a prohibition on the offender's firearm possession under state law, the federal law controlled the right under the federal statute. *Brailey*, 408 F.3d at 612-13.

Brailey also concerned the determination of what constituted a "conviction" under state law. Under the federal firearm statutes, Congress granted the authority to determine "conviction" under the state law: "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20)(B) (2000). Thus, the state's judicial determinations provide the limitations for a conviction.

85. *Taylor*, 495 U.S. at 601. The First Circuit, in dicta, distinguished *Taylor*'s approach dealing with sentencing guidelines from using a categorical approach to determine state predicate offenses that would constitute an element of the federal crime. The First Circuit declined to address the issue. *Nason*, 269 F.3d at 15 n.3.

86. Senator Frank Lautenberg discussed the adoption of § 922(g)(9) as part of the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996). Lautenberg's comments are located at 142 CONG. REC. S11872, S118676-78 (1996) (statement of Sen. Lautenberg). *See also Nason*, 269 F.3d at 17; *Smith*, 171 F.3d at 625.

87. *See Griffith*, 455 F.3d 1339; United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

or to provide confirmation for their interpretation.[88] With the circuit courts unable to determine what level of "physical force" qualifies as a misdemeanor crime of domestic violence for treatment under § 922(g)(9), arguably some ambiguity exists in the federal statute's interpretation.

Addressing the Senate, Senator Lautenberg gave his vision of the woman that the "Lautenberg Amendment" aimed to protect. Lautenberg related a fictional account of the "ordinary American woman" who was married to someone who is "generally a decent, law-abiding guy."[89] This "guy," according to Lautenberg's hypothetical story, "loses his temper because his emotions get the best of him ... loses control, flies into a rage and then strikes out violently at those closest to him."[90] According to Lautenberg, this man has been punished for his actions before. "Once he beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor and got away with a slap on the wrist."[91] At the hypothetical's conclusion, the man has one more fight with his wife, one that escalates out of control, and "with one hand he will strike his wife and with the other hand he will reach for the gun he keeps in his drawer .... [T]his woman ... will die or be severely wounded."[92]

With this image, Senator Lautenberg began his discussion of the proposed legislation's impact and purpose. The story is instructive in several respects. First, the hypothetical domestic offender committed a brutal, violent act against his spouse. Senator Lautenberg's offender did not commit a de minimis simple assault, although that may have been the ultimate charge. Second, Senator Lautenberg's hypothetical domestic offender was prosecuted for his crime but was able to plead to a misdemeanor. The hypothetical implies that the

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88. *See, e.g.*, United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999). "When ... the plain language of a statute unambiguously reveals its meaning, and the revealed meaning is not eccentric, courts need not consult other aids to statutory construction." *Id.* The First Circuit continued to say that "[f]rom time to time ... courts (perhaps manifesting a certain institutional insecurity) employ such secondary sources as a means of confirmation." *Id. Meade* involved a challenge to a conviction under § 922(g)(9), specifically addressing whether Congress intended that only misdemeanor convictions under a state statute which explicitly contained a domestic relation element could serve as predicate offenses. *Id.* at 218.

89. 142 CONG. REC. S11872, S11876 (1996) (statement of Sen. Lautenberg).

90. *Id.*

91. *Id.*

92. *Id.*

prosecution considered felony charges against the offender but for some reason chose to proceed with a misdemeanor charge.

Lautenberg's language only gives an image of what is, perhaps, one view of many possible applications of the legislation. Lautenberg may have described the image while on the floor of the Senate in order to sway his colleagues to support the legislation. Perhaps Lautenberg chose the image of a serious incident, one that would assuredly fall under the legislation, without intending to suggest that lesser misdemeanor crimes of domestic violence would not fall under the legislation's gambit.

When Senator Lautenberg directly addressed the statute's language, his statements were especially important. Lautenberg stated that the statute's final draft included the element of "the use or attempted use of physical force."[93] Lautenberg noted that previous versions of the bill did not include the language "crimes involving an attempt to use force ... *if such an attempt ... did not also involve actual physical violence*."[94] Lautenberg concluded, "In my view, anyone who attempts or threatens *violence* against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms."[95]

In *Nason*, the First Circuit incompletely quoted other language of the statute and may have misinterpreted the statute in its entirety. The *Nason* court determined "that Senator Lautenberg's statements ... indicate[d] that a principal purpose underlying Congress's substitution of 'crimes involving the use or attempted use of physical force' for 'crimes of violence' in section 922(g)(9) was to broaden the spectrum of predicate offenses covered by the statute."[96]

In fact, Lautenberg never suggested that the substitution of "crimes involving the use or attempted use of physical force" for "crimes of violence" was intended to broaden the scope of § 922(g)(9). Instead, the First Circuit overlooked Lautenberg's comments on the statute's original version. Lautenberg directly addressed the original version that contained the language "crime of violence."

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93. *Id.* at S11877.

94. *Id.* (emphasis added).

95. *Id.* (emphasis added). The Fifth Circuit in *United States v. White*, 258 F.3d 374 (5th Cir. 2001) determined whether mere threats could count as a predicate offense to prosecution under § 922(g)(9). *White* is discussed briefly *infra* at notes 140-47 and accompanying text.

96. United States v. Nason, 269 F.3d 10, 17 (1st Cir. 2001).

Stating that "[s]ome argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors,"[97] Lautenberg found this concern "far-fetched" but agreed "to a new definition of covered crimes that is more precise, and probably broader."[98] The result was that the original draft was altered at the behest of those who hoped to *narrow* the scope of the statute, though, as Lautenberg correctly pointed out, this might have resulted in inadvertently broadening its scope.[99]

The First Circuit also did not verbalize any consideration of Lautenberg's statements that, in his view, "anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms."[100] The continued use of the word "violent" by Senator Lautenberg is significant. The codified version of § 922(g)(9) does not include the word "violent" or any derivation of the word. Yet, perhaps not surprisingly, the Ninth Circuit held in *Belless* that "physical force," as it applies to § 922(g)(9), is the "violent use of force against the body of another individual,"[101] language which is reminiscent of Lautenberg's statements in the Congressional Record. When coupled with Lautenberg's statements about his concerns regarding domestic offenders who are able to plead down a felony charge to a misdemeanor (a fact not applicable to every domestic violence situation), the legislative history of the statute becomes quite unclear and lends support to both the First Circuit's opinion in *Nason* and the Ninth's in *Belless*.[102]

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97. 142 CONG. REC. S11872, S11877 (1996) (statement of Sen. Lautenberg).

98. *Id.*

99. *Id.* Had those members of Congress succeeded in narrowing the scope of the Lautenberg Amendment, this analysis would possibly be unnecessary. "Physical force" would almost certainly require violent physical contact.

100. *Id.*(emphasis added).

101. United States v. Belless, 338 F.3d 1063, 1068 (9th Cir. 2003).

102. Interestingly, the Eighth Circuit in *Smith* recognized that Congress was "concerned with domestic abuse offenders who were successful in pleading a felony charge down to a misdemeanor and thus escap[ed] the effect of the *felon-in-possession* statutes." United States v. Smith, 171 F.3d 617, 625 (8th Cir. 1999) (emphasis added). Again, the Eighth Circuit has recognized that the offender in question may have been charged under felony statutes. *See id.*

II. COMBATING DOMESTIC VIOLENCE: CRIMES AND PROSECUTIONS

The Department of Justice's figures have indicated that family violence constituted 11 percent of the total number of reported and unreported acts of violence between 1998 and 2002.[103] This figure only begins to detail the terrible plague that domestic violence is on society, and it does so only in a sterile and distanced manner. Quantified differently, 11 percent of the total number of reported and unreported acts of violence for that period encompasses approximately 3.5 million violent crimes against family members.[104] Tracking domestic violence adjudication at the state court level, the Department of Justice has concluded that approximately 71.3 percent of adjudicated family assault cases result in convictions, 48.1 percent for felonies, and 23.2 percent for misdemeanors.[105] Approximately one quarter of family assault cases did not result in conviction, mostly due to dismissal.[106]

Considering that 11 percent of all reported and unreported violence results from family violence, intuition suggests that the number of convictions under 18 U.S.C. § 922(g)(9) would be substantial. However, the number of suspects referred to the U.S. Attorney for possible prosecution under § 922(g)(9) is incredibly low. For the period between 2000 and 2002, only 630 suspects were referred to U.S. Attorneys for possession of a firearm after a previous conviction for domestic violence.[107] That figure does not distinguish between convictions for felonies or misdemeanors. From 2000 to 2002 the total number of federal suspects was 18,653; the 630 referrals for firearm violations by felons/misdemeanants in possession following domestic violence conviction accounts for approximately 3.4 percent of the referrals.[108]

The empirical data is clear: in its current form § 922(g)(9) protects victims of domestic violence from domestic offenders who wish to

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103. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 207846, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1 (2005), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf [hereinafter FAMILY VIOLENCE STATISTICS].

104. *Id.*

105. *Id.* at 49.

106. *Id.*

107. *Id.* at 51.

108. *Id.*

purchase firearms and not necessarily from those who already possess them. Senator Frank Lautenberg recently recognized the importance of his legislation codified in § 922(g)(9) at a ceremony in Washington, D.C. The official report from the office of Senator Lautenberg mentions only the number of gun purchases denied as a result of § 922(g)(9) and does not mention any convictions under the statute.[109] Senator Lautenberg's office reported a significant number of attempted purchases prevented through the statute: approximately 150,000 since 1996.[110] This is a substantial figure, especially when it is compared to the number of federal prosecutions for firearm possession by domestic offenders. The question remains, however, as to whether the difficulty interpreting § 922(g)(9) affects potential prosecutions of misdemeanant domestic offenders.

Three interpretations of § 922(g)(9) are promulgated under the *Smith*/*Griffith* analysis,[111] the *Nason* analysis,[112] and the *Belless* analysis.[113] Whether any of these interpretations will affect the prosecutions of those misdemeanants who possess firearms remains to be seen. The low number of federal prosecutions tends to indicate one or more of the following: (1) a lack of federal resources to adequately prosecute firearm offenses, (2) state preference to charge domestic offenders under non-predicate offenses under the state's law, (3) compliance with possession laws following misdemeanor domestic violence conviction by the misdemeanant, (4) judicial nullification by the federal courts, (5) restoration of rights, (6) failure to charge offenses in the federal system, or (7) a combination of these factors.

As a federal firearms offense, § 922(g)(9) is wholly reliant upon a conviction for a state misdemeanor crime of domestic violence. If one assumes that § 922(g)(9) should be interpreted as in the First

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109. OFFICE OF SENATOR FRANK R. LAUTENBERG, THE DOMESTIC VIOLENCE GUN BAN TEN YEARS LATER: LIVES SAVED, ABUSERS DENIED 2 (2006), *available at* http://lautenberg.senate.gov/newsroom/documents.cfm (follow "The Domestic Violence Gun Ban Report" hyperlink) (last visited Mar. 7, 2008).

110. *Id. See also* Press Release, Office of Senator Frank R. Lautenberg, On 10th Anniversary of Domestic Violence Gun Ban, Lautenberg Report Shows Law's Impact (Oct. 6, 2006), *available at* http://lautenberg.senate.gov/newsroom/record.cfm?id=264502&&.

111. United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); United States v. Smith, 171 F.3d 617 (8th Cir. 1999).

112. United States v. Nason, 269 F.3d 10 (1st Cir. 2001).

113. United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

Circuit's opinion in *Nason*, which allowed the state court's decisions to create the limitations on what qualifies for the predicate amount of "physical force,"[114] the effect on federal prosecutions would most likely be unchanged. Such an interpretation would, however, grant the state prosecutor the greatest authority to effectuate the state's criminal sanctions on a domestic offender and ultimately affect the convicted criminal's ability to possess a firearm under the federal misdemeanant in possession statute.

A. Society's Response: Police and State Prosecutorial Discretion

Social response to combat domestic violence begins not with the prosecution of domestic violence cases but with local arrest policies. Currently all states, with the exception of Arkansas, have either pro-arrest policies or more proactive mandatory arrest policies.[115] However, "[e]ven in jurisdictions with mandatory arrest policies, police generally have some discretion about whether to make an arrest on a domestic disturbance call."[116] Police discretion to arrest at the scene of a domestic disturbance is contingent on a number of "extralegal" factors: seriousness of injury, gender, marital status of complainant, and intoxication.[117] The effect of pro-arrest and mandatory arrests is unclear. There has been some indication that mandatory arrests can lead to an increase in dual arrests (arrests of both domestic partners) and may lead to a "decrease in domestic disturbance calls."[118]

Aside from the responding officer's discretion to press an arrest incident to a domestic disturbance, the charging discretion falls to

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114. *Nason*, 269 F.3d at 17-21.

115. *See* DENISE A. HINES & KATHLEEN MALLEY-MORRISON, FAMILY VIOLENCE IN THE UNITED STATES 306 (2005).

116. *Id.*

117. *See id.*

118. *Id.* The reason for the increase in dual arrests is currently being debated. On one hand, dual arrests may indicate that violence in the home is "mutual between the partners," or, conversely, that it is "one more way of blaming the victim and further victimizing women." *Id.*

Another commentator noted that by removing the discretion to arrest, the mandatory arrest policy makes a social statement about the serious nature of domestic violence and "helps counter the general reluctance of courts to extend to women the civil rights protection granted to racial minorities." Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 129 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

the prosecutor. Not long ago, commentators viewed prosecutors not as facilitating the prosecution of domestic offenders, but as hindering it. As illustrative of the prosecution's attitude toward a domestic abuser, consider:

> Prosecutors were said to be at best, apathetic toward, and at worst, disdainful of prosecuting domestic violence cases because of their purported perceptions that domestic violence cases were trivial or difficult to prosecute successfully, especially if victims were reluctant to serve as witnesses. As a result of this pessimism, the past had been witness to the use of prosecutorial discretion to discourage the filing of domestic violence complaints.[119]

That pervasive attitude has shifted, and 18 U.S.C. § 922(g)(9) is emblematic of the recognition that domestic violence is a serious social problem. The state prosecutor will make the charging decision, and that decision is made "virtually free from judicial control."[120] "The charging decision is the heart of the prosecution function."[121] The American Bar Association (ABA) has outlined a series of factors to be considered in charging a criminal defendant, including (1) the prosecutor's "reasonable doubt" in the suspect's guilt, (2) the amount of harm that occurred because of the offense, (3) the proportion of punishment to the offense or offender, (4) any improper motivation by the complaining party, (5) whether the victim is willing to testify, and (6) any assistance from the suspect.[122] Furthermore, the ABA has stated that the "prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction."[123]

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119. Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK?, *supra* note 118, at 176-77.

120. JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 3.09 (3d ed. 2003).

121. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 72 (3d ed. 1993).

122. *Id.* at 71.

123. *Id.* Of course, the "no-drop" policy in some jurisdictions is the prosecutorial corollary to the mandatory arrest mentioned *supra* notes 115-18. *See* Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003).

Officers responding to domestic disturbances witness assaults in upwards of a third of those disturbances,[124] and this should negate the prosecutor's "reasonable doubt" in the domestic offender's guilt. The harm witnessed in these calls can be substantial, with injuries at police-attended domestic disturbances occurring 36 percent of the time.[125] The difficult charging issues are not, then, "reasonable doubt" and harm. Thus, the six ABA charging standards, if utilized consciously by the prosecutor in a domestic violence case, should often lead to a decision to charge a domestic offender. The difficulty lies in the issues of proportional punishment, improper motivation, and victim willingness to testify.

The impact of § 922(g)(9) directly correlates to the proportionality of the punishment and, although a federal crime, could play an important role in the decision to charge a misdemeanant offender under state law. The most common domestic violence offense is simple assault.[126] The criminal sanction resulting from a simple assault conviction is much smaller than the resulting conviction of possession of a firearm under § 922(g)(9). For example, in *Smith*, the predicate simple assault resulted in a fine of $100,[127] and in *Nason* the predicate assault resulted in a "three-day jail sentence."[128] A conviction under § 922(g)(9), on the other hand, can lead to a sentence of up to ten years in prison[129] and will result in the inability to possess a firearm absent restoration of rights.[130] Regardless of constitutional challenges to the proportionality of the federal possession charge,[131] the decision to prosecute may hinge on the decision to take away the ability to possess a firearm. The decision to remove firearms may be especially difficult in law enforcement or military contexts.

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124. DONALD G. DUTTON, RETHINKING DOMESTIC VIOLENCE 252 (2006).

125. *Id.*

126. FAMILY VIOLENCE STATISTICS, *supra* note 103, at 1.

127. United States v. Smith, 171 F.3d 617, 619 (8th Cir. 1999).

128. United States v. Nason, 269 F.3d 10, 12 (1st Cir. 2001).

129. 18 U.S.C. § 924(a)(2) (2000).

130. *Id.* § 921(a)(33)(B)(ii).

131. Eighth Amendment Challenges to § 922(g)(9) have been tried in the federal courts. These suits have failed. *See, e.g.*, United States v. Finnell, 256 F. Supp. 2d 493, 497 (E.D. Va. 2003) (denying proportionality review because the sentence was less than life imprisonment without the possibility of parole).

Congress may never have intended to "force an abuser out of employment as an additional punishment for committing domestic violence,"[132] but that is the consequence of a misdemeanor domestic violence conviction under § 922(g)(9) for law officers and military service members who have been so convicted.[133] Section 922(g)(9) has had a chilling effect in its application toward law enforcement officials who engage in domestic abuse. In a report for National Public Radio, Wendy Kaufman found that the statute was "forc[ing] police departments to confront the issue of domestic violence within their ranks" and that "the law has had unintended consequences."[134] The most significant consequence, according to Kaufman, was the "chilling effect on the victims, because victims now are afraid to come forward. They know that it could cost [the law enforcement officer] his job."[135] In jurisdictions where the prosecution does not or cannot force the victim to testify against the offender, § 922(g)(9) might actually reinforce a violent family situation.

The application of the three interpretations of "physical force" as read into § 922(g)(9) would each differently affect the prosecution's willingness to prosecute in these domestic violence situations. The interpretation of *United States v. Nason*[136] is the most effective when dealing with prosecutorial discretion in the domestic violence situation. Discussing the charging decision, one commentator wrote:

> The prosecutor is in the best position to perform the overall analysis necessary to determine which cases may be suitable for nontrial disposition. The prosecutor knows the full volume of pending cases, the strengths and weaknesses of each particular case and the need, if any, for the testimony of a particular defendant to implicate [a] more culpable defendant. Only the prosecutor has all the necessary information available to make

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132. Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 9 (2005) (citation omitted). May's discussion focuses on the judiciary's action in "misapplying or refusing to apply state domestic violence laws" and does not focus on the effect of prosecutorial discretion. *Id.* at 10. The applicability of these ideas to the prosecutorial context is not difficult to see.

133. *See* White v. Dep't of Justice, 328 F.3d 1361, 1363 (Fed. Cir. 2003).

134. *Morning Edition: Police and Domestic Violence* (NPR radio broadcast Aug. 14, 2003), *available at* http://www.npr.org/templates/story/story.php?storyID=1395242.

135. *Id.*

136. 269 F.3d 10 (1st Cir. 2001).

> this determination and, accordingly, the courts are inclined to defer to his discretion.[137]

Nason, to state it simply, provides the prosecutor the most breadth to prosecute a domestic offender under the state law and bring that offender under the gamut of the federal firearm ban. Its analysis allows the prosecutor the widest leeway to consider the judicial findings of the forum state and appropriately charge the offender. Comparatively, *Smith* and *Griffith*, which found that a conviction under any state statute with the element of physical force will qualify,[138] may further provide a chilling effect on the prosecutor because every conviction would result in a federal firearm restriction. *Belless* might lead to overcharging the offenses because it requires violent physical force for the federal statute to apply to a convicted domestic offender,[139] and, absent such force, § 922(g)(9) would be inapplicable.

The importance of knowing the impact and application of the state law in charging is demonstrated in *United States v. White*,[140] a Fifth Circuit opinion dealing with § 922(g)(9) that has been criticized for its holding.[141] The court overturned Robert Allan White's conviction for one count of violating § 922(g)(9) because his prior misdemeanor convictions did not include the use or attempted use of force as an element.[142]

During a custody battle, White's estranged spouse alerted the Bureau of Alcohol, Tobacco, and Firearms that White had been convicted of predicate offenses under state law and possessed nine firearms.[143] White had two misdemeanor convictions under two separate sections of the Texas Penal Code. One conviction resulted from a violation of Texas Penal Code § 22.05(a), reckless conduct,

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137. LAWLESS, *supra* note 120, at § 3.06 (citation omitted).

138. *See* United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); United States v. Smith, 171 F.3d 617 (8th Cir. 1999).

139. *See* United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

140. 258 F.3d 374 (5th Cir. 2001).

141. For criticism of the holding, see Lininger, *supra* note 47, at 575-76.

142. *White*, 258 F.3d at 384.

143. *Id.* at 378-79 & 379 n.5.

and the other for a violation of Texas Penal Code § 22.07(a)(2), terroristic threat.[144]

The Fifth Circuit drew an apt comparison to the language of the Texas assault provision in the penal code.[145] The Texas assault statute contains language very similar to both Texas's reckless conduct and terroristic threat provisions, but contains elements of physical force.[146] Factual reiterations by the Fifth Circuit suggest that White could have been charged under the assault statute with the element of physical force, which would qualify his misdemeanor conviction under § 922(g)(9).[147] In short, *White* demonstrates the wide latitude the prosecutor has in charging a misdemeanant under state law. Although there is no indication that the state prosecutor considered § 922(g)(9) when making the charging decision, a prosecutor versed in federal law has the same discretion in charging and may consider such state law alternatives to charging a misdemeanor, which would qualify for federal conviction under § 922(g)(9).

B. Prosecutorial Discretion and the Military

The military is often portrayed as a "special population" prone to domestic violence.[148] Others have posited that the military is not

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144. *Id.* at 381-82. Texas Penal Code § 22.05(a) reads, "A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury." TEX. PENAL CODE ANN. § 22.05(a) (Vernon 2003). The language of White's other conviction, terroristic threat, also did not include an element of use or attempted use of physical force: "[A] person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to ... place any person in fear of imminent serious bodily injury." *Id.* § 22.07(a)(2).

145. *White*, 258 F.3d at 382 n.10.

146. Texas Penal Code § 22.01(a) reads:

> (a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

147. *White*, 258 F.3d at 377.

148. *See* Christine Hansen, *A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military*, *in* II VIOLENCE AGAINST WOMEN 1-27, -29 (Joan Zorza ed., 2004).

more disposed to violent behavior, but more informed, and has gone public about the problem of domestic abuse in its ranks.[149] Regardless, civilian and military sectors have large differences in their treatments of domestic abuse. In state court prosecutions for domestic violence, prosecutorial discretion may lead to ex parte nullification by the prosecutor, the choice to charge a domestic offender under alternate statutes without the use or attempted use of force, or judicial nullification by the sitting judge.[150] The military, however, has even broader discretion under the Uniform Code of Military Justice[151] to effectuate prosecutions for domestic violence because of the structure of military justice in the Armed Forces.

Consider a hypothetical Army Company Commander faced with a Military Police report that one of his soldiers has touched his wife in an insolent and offensive manner during a domestic dispute. The Commander faces a myriad of possibilities that include both judicial and nonjudicial punishment.[152] Military Commanders, well aware of the result should a soldier be convicted of a "misdemeanor crime of domestic violence,"[153] must consider their choices carefully. Nonjudicial punishment may lead to continued domestic problems in the home; judicial punishment may lead to expulsion from the military.[154]

The Uniform Code of Military Justice provides for multiple levels of courts martial, in increasing levels of seriousness: summary, special, and general courts martial.[155] Summary courts martial convictions are not "convictions" in the technical sense of the word.[156] Only special and general courts martial qualify as federal

149. Deborah D. Tucker, a member of the Department of Defense Task Force on Domestic Violence and former head of the National Training Center on Domestic and Sexual Violence once stated, "I think the difference might be that when the military knows about abusive behavior, intervention at even relatively low levels of abuse tends to be much more swift and complete." Linda D. Kozaryn, *Task Force Calls for Crackdown on Domestic Violence*, AM. FORCES PRESS SERV., Mar. 9, 2001, *available at* http://www.defenselink.mil/news/Mar2001/n03092001_200103095.html.

150. *See* May, *supra* note 132, at 1-2.

151. Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000).

152. *Id.* §§ 815, 822-24.

153. 18 U.S.C. § 922(g)(9) (2000).

154. 10 U.S.C. §§ 818-20.

155. *Id.* § 816.

156. *See* United States v. Rogers, 17 M.J. 990, 992 (A.C.M.R. 1984).

offenses.[157] Additionally, the Uniform Code of Military Justice allows for nonjudicial punishment imposed by military commanders.[158] Article 15 punishments (nonjudicial punishment) also do not constitute convictions under federal law.[159]

Some military critics believe that the prosecution of domestic violence offenses in the military has been unequal and almost unsuccessful.[160] Furthermore, public opinion is often that military commands do not consider the actual domestic violence offense but other factors–such as cost of training recruits, time in service, and military record–when making a determination to prosecute or not to prosecute.[161] This does not relate the entire picture, as "[n]o commanding officers treat convictions identically."[162]

Many considerations in a decision to prosecute a service member go beyond mere consideration of service record or costs involved. In light of all the possibilities and alternative forms of punishment under the Uniform Code of Military Justice, how does a military commander and military prosecutor approach a domestic violence situation in light of the current understanding of "physical force" under 18 U.S.C. § 922(g)(9)? A finding that *any* physical force will qualify, as in *Smith*, *Griffith*, and *Nason*,[163] may lead military prosecutors to prosecute domestic offenders unevenly, leading to increased use of nonjudicial punishment or summary courts martial; under this regime any soldier convicted of domestic simple assault could face prosecution under § 922(g)(9) for firearm possession. A finding that only *violent* physical force qualifies, as in *Belless*,[164] may lead to over-prosecution, because a proven simple assault may not involve truly violent force, making § 922(g)(9) inapplicable.

Military justice is not dependent on state law. The Uniform Code of Military Justice more clearly defines "physical force" in charges

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157. *Id.*

158. *See generally* U.S. DEP'T OF THE ARMY, REGULATION 27-10, MILITARY JUSTICE 3-7 (Nov. 16, 2005), *available at* http://www.army.mil/usapa/epubs/pdf/r27_10.pdf. This Article refers only to Army regulations. Other services have appropriate counterpart publications.

159. United States v. Brown, 23 M.J. 149, 150 (C.M.A. 1987).

160. Hansen, *supra* note 148, at 1-29 to -30.

161. *Id.* at 1-33 to -35.

162. Casey Gwinn, *Prosecuting an Abuser in the Military*, *in* II VIOLENCE AGAINST WOMEN, *supra* note 148, at 6-1, 6-3.

163. *See supra* Parts I.A, I.C.

164. *See supra* Part I.B.

such as assault than the state laws discussed above. Article 128 of the Uniform Code of Military Justice outlines the requirements for assault.[165] According to the Manual for Courts Martial, simple assault has two elements: (1) "[t]hat the accused attempted or offered to do bodily harm to a certain person," and (2) "[t]hat the attempt or offer was done with unlawful force or violence."[166] Under this language, the level of physical force appears to be "violen[t]" enough to cause "bodily harm." Although this language suggests a higher threshold of physical force, the Manual for Courts Martial clarifies that "'[b]odily harm' means any offensive touching of another, however slight,"[167] seemingly reducing that threshold to *any* amount of physical force as long as it is "offensive." If the Uniform Code of Military Justice allows for assault convictions premised on any amount of force, commanders may be hesitant to prosecute offenders within the military system. This hesitation would be greater than if the civilian courts with concurrent jurisdiction over the offense followed the analyses of *Smith* and *Griffith*. In either situation, the domestic offender would be subject to § 922(g)(9) upon any simple assault conviction. If the analysis promulgated by the local federal courts followed either a *Nason* or a *Belless* interpretation, commanders would be less hesitant to allow prosecutions of domestic offenders in the civilian courts. In a *Nason* jurisdiction, the state law may eliminate some of the de minimis or offensive contact charges, whereas, in a *Belless* jurisdiction, all nonviolent charges could not serve as a predicate offense to § 922(g)(9)'s firearms prohibitions.

Within the military justice system, allowing for prosecutorial and command discretion in charging would allow for the most even application of the Uniform Code of Military Justice and § 922(g)(9). In this case, the military prosecutor and commanding officer consider the facts as they best understand them. As military justice is command-driven, the Commander working closely with a domestic offender in uniform and the military justice system may be in the best position to seek the appropriate level of nonjudicial or judicial punishment for the uniformed offender. The problem with broad

165. 10 U.S.C. § 928 (2000).
166. MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV, ¶ 54b(1)(a)-(b) (2005).
167. *Id.* ¶ 54c(1)(a).

discretion is that it places huge importance on the decisions of a not wholly impartial actor, the Commander, who may have difficulty seeking the correct level of punishment for a soldier in a tight-knit command.[168]

Despite some of the criticism, the military is not ignoring the problem of domestic violence. As an indication of the military culture imposing its own limitations on broad prosecutorial discretion, military installations have entered into memoranda of understanding with local communities and law enforcement agencies to ensure that domestic violence is addressed in a judicial and nonjudicial fashion.[169] These memoranda include agreements to ensure the "[p]rocessing and disposition of cases through the local criminal justice systems and the corresponding military processing and disposition of reported cases."[170] Such agreements indicate a willingness on the part of the military to engage in understanding and confronting the problem of domestic violence, including prosecutions in civilian and military courts.

CONCLUSION

Section 922(g)(9) is a product of the infusion of state substantive law into the federal criminal process. As a relatively new criminal statute enacted to combat the problem of domestic violence in this country, the statute continues to undergo judicial consideration and interpretation to clarify its ambiguities. Although several circuits have understood "physical force" under § 922(g)(9) to mean that *any* amount of force will qualify a misdemeanant,[171] that definition has been narrowed by the Ninth Circuit.[172] Different interpretations of "physical force" will have (and have had) an effect on the

168. For prosecutors outside the military system who have begun prosecuting the military offender, the command decision means little. As one prosecutor has stated, "[T]he commanding officer's reactions are not the [non-military] prosecutor's responsibility. Prosecutors should do their jobs in prosecuting domestic violence cases and then allow the military to do its job with the offender." Gwinn, *supra* note 162.

169. Chantal Escoto, *Fort Campbell—Army's Pathfinders in Ending Abuse*, THE LEAF-CHRON., Apr. 13, 2005, at 1A.

170. Memorandum of Understanding from the Military/Civilian Coordinated Cmty. Response Demonstration 3 (Apr. 12, 2005) (on file with author).

171. *See* United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006); United States v. Nason, 269 F.3d 10 (1st Cir. 2001); United States v. Smith, 171 F.3d 617 (8th Cir. 1999).

172. *See* United States v. Belless, 338 F.3d 1063 (9th Cir. 2003).

prosecutions of domestic offenders under the statute. Because the statute is one of the new breed of federal statutes based on state substantive law, application of the statute from state to state may be arbitrary. By attaching federal criminal sanctions to state convictions, such varying outcomes are inevitable.

The practical effect of § 922(g)(9) has been to prohibit convicted misdemeanant domestic offenders from purchasing firearms. Yet, the federal courts prosecute few misdemeanants for possession of a firearm. The federal courts will continue to be unable to prosecute misdemeanant firearm possession under § 922(g)(9) if state prosecutors are unwilling to bring simple assault and other charges against offenders to avoid this ultimate, lifelong sanction.

Instead of ignoring the state court interpretations of the state's own criminal statutes, federal courts applying § 922(g)(9) should consider them. Consideration of the state court interpretation and case law gives the state prosecutor the greatest ability to combat domestic violence, choosing the most appropriate charge to prosecute. The state prosecutor is in the best position to determine whether the domestic offender is a violent offender who will "reach for the gun" or an offender whose actions are mildly offensive but unlikely to lead to further violence. The decision in *United States v. Nason* provides prosecutors that latitude, and the federal courts should adopt its interpretation.[173] In one sense, that adoption may have little immediately discernable impact: just as the *Nason* court found, even simple assault for "offensive touching" can satisfy the physical force requirement.[174] Simple assault by "offensive touching" may not satisfy the requisite level of force in other states, as the Ninth Circuit determined in *United States v. Belless*.[175] By adopting the *Nason* approach, state prosecutors are sure to know the ultimate sanction against the offenders they prosecute, for the prosecutor knows the level of force needed for a conviction. This adoption would eliminate some of the concerns of the domestic violence cases that fall into the "gray area" between truly violent contact and de minimis touching and would lessen the concerns that law enforcement and military service members could be terminated for their

173. 269 F.3d at 10; *see supra* Part I.C.
174. *Nason*, 269 F.3d at 18-19.
175. 338 F.3d at 1068-69.

inability to carry a firearm upon conviction. If the current federal law inserts some arbitrariness into the system based on its use of state substantive law, that arbitrariness would be best controlled by prosecutors, as they are best able to discern who should face the indefinite prohibition on firearm possession. Absent such control, the federal circuits will unevenly apply the law until Congress or the Supreme Court provides a uniform interpretation.

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